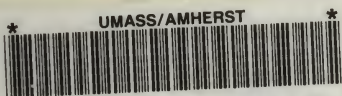


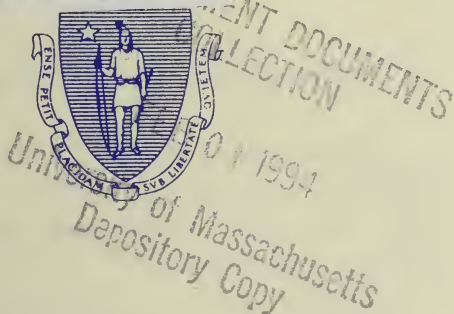
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Commonwealth of Massachusetts

Berkshire District Attorney



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THE OPEN MEETING LAW

Gerard D. Downing
Berkshire District Attorney

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Commonwealth of Massachusetts

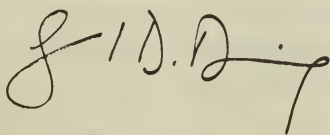
Berkshire County has a long and proud tradition of open government featuring broad citizen participation. Since its enactment in 1975, the "Open Meeting Law" has been a key element in preserving and protecting this tradition.

In the ensuing years since 1975, Chapter 39, Section 23B has been amended on several occasions. Each of these amendments has sought to expand and/or clarify the scope and use of this important statute.

I understand the important power which this law grants to each District Attorney to act on Open Meeting Law complaints, including bring suit to invalidate actions which were taken in violation of this statute.

It is my intent that this guidebook will both assist those who seek to apply the law and prevent the occurrence of most violations.

All citizens of Berkshire County are better served by government which operates within both the letter and the spirit of the Open Meeting Law.

A handwritten signature in cursive script, appearing to read "J. D. D.", followed by a long horizontal flourish.

District Attorney

“OPEN MEETING LAW”
MASSACHUSETTS GENERAL LAWS
CHAPTER 39 SECTION 23B

The legislative purpose in enacting Massachusetts General Law Chapter 39, Section 23B, was to eliminate much of the secrecy involved in local government by mandating that, with certain well defined exceptions, all governmental meetings and records be open to and available for inspection by the public.

In view of the legislative purpose, it is the opinion of the District Attorney that M.G.L. Chapter 39, Section 23B, must be construed liberally in favor of openness, making public meetings and records available to the public under most circumstances and conditions.

The following material is an outline of Chapter 39, Section 23B, setting forth its procedural and substantive requirements, along with the definitions of certain terms and (where applicable) an explanation of the statute's provisions.

I. Introduction:

A. All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting *except* as otherwise provided by law. A governmental body is defined as:

Every board, commission, committee or subcommittee of any district, city, region or town however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority.

B. A governmental body cannot meet in a private session unless such action is authorized by Chapter 39, Section 23B.

C. A quorum of a governmental body cannot meet in a private session, unless authorized by this statute, for the purpose of deciding an issue or *deliberating toward* a decision. Con-

sequently, a quorum of a governmental body should not engage in a private meeting, unless specifically authorized by this statute, where their discussions are designed to either resolve an issue or aid in the resolution of an issue.

II. Executive Session:

A. Executive Sessions are defined by the statute as any meeting of a governmental body which is closed to certain persons for deliberations on certain matters or issues.

1. Executive sessions shall not be held *until*:

(a) The governmental body has first *convened* in an open session for which notice has been given.

(b) A majority of the members have *voted* to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes.

(c) The presiding officer has *cited* the purpose for an executive session.

(d) The presiding officer has *stated* before the executive session that the governmental body will reconvene after the executive session.

All four of the above conditions must be met before an executive session can be held.

2. Once an executive session has been convened, minutes of the executive session must be made, including all votes taken, and the minutes must accurately reflect what transpired during the executive session. (See "Recording the Meeting" below.)

3. Nothing except the limitation contained in Chapter 39, Section 23B shall be construed to *prevent* the governmental body from holding an executive session.

B. Executive sessions may be held *only* for the following purposes:

1. Personal matters:

To discuss the reputation, character, physical condition, or mental health rather than the professional competence of an individual. Elucidation of this statement calls for a very broad interpretation of the term, "professional competence," and encompasses all aspects of a person's professional status. The discussion of professional competence, at any time and in any manner, should be open to the public and not held in executive session. If there is any doubt as to whether professional competence has become an issue, then an executive session should not be convened. Executive sessions may be held only when the issues relate to reputation (excluding professional reputation), character (excluding professional character), physical condition (excluding physical condition's impact on professional competence) and mental health (excluding mental health's impact on professional competence). Consequently every discussion that is in any way related to a person's professional competence *must* be held in an open public session.

(a) Individual Rights — If an executive session is held for any of the above reasons, the individual concerned has the following rights:

- i. The individual must be given 48 hours notice in writing before the executive session.
- ii. Such notice may be waived by the agreement of the individual and the governmental body.
- iii. The individual may request an open meeting and the governmental body must honor the request.
- iv. If an executive session is held the individual has the right:

(a) to be present during discussion or considerations which involve that individual.

(b) to have counsel or a representative of his own choosing present. Such representative may advise the individual but not actively participate in the session.

(c) to speak in his own behalf.

2. Personnel matters:

To *consider* the discipline or dismissal of, or to hear complaints or charges brought against a public officer, employee, staff member, or individual.

(a) Individual's Rights — Again, if an executive session is held for the above reasons, the individual concerned has the following rights:

i. The individual must be given 48 hours notice, in writing before the executive session.

ii. Such notice may be waived by the agreement of the individual and the governmental body.

iii. The individual may request an open meeting and the governmental body must honor the request.

iv. If an executive session is held the individual has the right:

(a) to be present during discussions or considerations which involve that individual.

(b) to have counsel or a representative of his own choosing present. Such representative may advise the individual but not actively participate in the session.

(c) to speak in his own behalf.

3. To *discuss* strategy with respect to collective bargaining or litigation, *if* an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, and to *conduct* collective bargaining sessions or contract negotiations with nonunion personnel. Collective bargaining sessions encompass not only negotiations leading to an agreement but may also include the resolution of grievances pursuant to the collective bargaining agreement.

4. To *discuss* the deployment of security personnel or devices.

5. To *investigate* charges of criminal misconduct or to *discuss* the filing of criminal complaints.

6. To *consider* the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.

7. To *comply* with the provisions of any general or special law or federal grant-in-aid requirements.

8. To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body. This clause shall not apply to any meeting to consider and interview applicants who have passed a prior preliminary screening and are presented as finalists for the position.

III. Voting in Open Meetings and in Executive Sessions:

All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

IV. Chance Meetings:

The Open Meeting Statute shall not apply to any chance meeting or a social meeting at which matters relating to official business are discussed *so long as* no final agreement is reached.

However, no chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act a matter over which the governmental body has supervision, control, jurisdiction or advisory power.

Consequently, it is apparent that members of a governmental body can discuss matters related to official business as long as an agreement is not reached on an issue. And, if a quorum is present, discussions for the purpose of *deliberating towards* a decision are prohibited. (See introduction.)

Chance and social meetings should not be employed to circumvent the spirit and requirements of this statute. Any matter, therefore, properly before the governmental body should not be handled by a chance or social meeting.

V. Notice Requirements:

A. Except in an emergency, a *notice of every* meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts. An emergency, which is defined as a sudden, generally unexpected occurrence or set of circumstances demanding immediate action, will be narrowly construed, under this statute, and the burden of proof will be upon the person declaring the emergency to so prove it.

1. Notice or copy thereof shall, at least 48 hours, including Saturdays but not Sundays and legal holidays prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town. The notice shall contain the date,

time and place of said meeting, but need not specify the agenda or subjects to be discussed at the meeting. The filing and posting of the notice shall be the responsibility of the officer calling such meeting.

2. The secretary of a regional school district committee shall be considered to be its clerk; and he or she;

(a) shall *file* the notice of meetings of the committee with the clerk of each city or town within such district and the clerk shall *post* the notice in his office or on the principal official bulletin board of the city or town; and

(b) shall *post* such notice in his office or on the principal official bulletin board of the district.

3. If the meeting shall be of a regional or district governmental body, the officer calling the meeting shall file the notice thereof with the clerk of each city and town within such region or district, and the clerk shall *post* the notice in his office or on the principal official bulletin board of the city or town.

4. Notice to the Chief Executive Officer or officers of a municipal government would constitute proper notice to the municipality.

VI. Recording the Meeting:

A. A governmental body shall maintain accurate records of its meetings setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. A verbatim transcript is not required.

1. The records of each meeting shall become public record and may be made available to the public; provided however that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer.

2. A meeting of a governmental body may be recorded by *any* person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

3. Copies of the records of the meeting must be furnished upon the payment of a reasonable fee. (M.G.L. Chapter 66, Section 10.)

VII. Members To Be Given Copies Of The Open Meeting Law:

A. Upon qualification for office following an appointment or election to a governmental body as defined in this section, the member shall be furnished by the city or town clerk with a copy of this section. Each such member shall sign a written acknowledgement that he has been provided with such a copy.

VIII. Enforcement:

A. The District Attorney of the county in which the violation occurred shall enforce the provision of this section.

B. Upon proof of failure by any governmental body, or any member or officer thereof to carry out any of the provisions for public notice or meetings, for holding open meetings, or for maintaining public records thereof, any justice of the Supreme Judicial Court or the Superior Court sitting within and for the county in which such governmental body acts shall issue an appropriate *order* requiring such governmental body or officer thereof to carry out such provisions at future meetings.

1. Order may be sought by complaint of:

- (a) 3 or more registered voters;
- (b) the attorney general; or

- (c) the district attorney of the county in which the city or town is located.
2. The order of notice on the complaint shall be returnable:
- (a) No later than 10 days after the filing thereof.
- (b) The complaint shall be heard and determined on the return day, or on such day as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties.
- (c) Orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purpose of this section.
3. In the hearing of such complaints:
- (a) The burden shall be on the governmental body, member, or officer accused to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with, and authorized by sec. 11A 1/2 of chapter 30A, by sec. 9G of chapter 34 or by this section (Chapter 39, Section 23B). The custodian of the record has the burden to show that a document is not a "public record" subject to disclosure. Exemptions from public record are found in Chapter 4, Section 7, Clause 26 of the General Laws.
- (b) All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

IX. Remedies:

A. A court order may invalidate *any action* taken at any meeting at which any provision of this section has been violated, provided that

such complaint is filed within 21 days of the date when such action is made public. A judge, presented with a complaint, has the discretion to let the governmental body's action stand or invalidate it.

B. Upon proof of failure by any governmental body to carry out the provisions for public notice or meetings, or after provisions of the Open Meeting Law, the governmental body shall be ordered to comply with such provisions at future meetings.

C. An order may, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive, but shall be in addition to every available remedy.

D. The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session are in addition to the rights that an individual may have from any other source, including but not limited to, rights under any laws or collective bargaining agreements and the exercise or nonexercise of the individual rights under this section shall not be construed as a waiver of any rights of the individual.

X. Regulation of Participation By Public -

Open Meetings

Massachusetts General Laws

Chapter 39, Section 23C

A. Any person who asks to address a public meeting must have permission of the presiding officer.

B. When the presiding officer requests silence, all persons shall be silent.

C. A presiding officer may warn a person who is disruptive at the meeting to desist.

D. If a disruptive person who is warned by the presiding officer persists in disorderly behavior, the presiding officer may order him or her to withdraw from the meeting.

E. If the person does not withdraw, the presiding officer may order a constable or any other person to remove him or her and confine him or her in some convenient place until the meeting is adjourned.

Definitions:

A. Governmental Body — Every board, commission, committee or sub-committee of any district, city, region or town however elected, appointed or otherwise constituted and the governing board of a local housing redevelopment or similar authority.

B. Executive Sessions — Any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.

C. Quorum — A simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.

D. Deliberation — A verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.

E. Reputation — The character commonly imputed to one as distinguished from an individual's actual character. The community's judgment of a person.

F. Character — One of the attributes or features that make up and distinguish the individual. The combination of moral, religious, and intellectual beliefs that a person uses to direct his life.

G. Professional Competence — The requisite ability or qualities in a chosen field of endeavor.

H. Meeting — Any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision

at which any public business or public matter over which the governmental body supervision, control, jurisdiction, or advisory power is discussed or considered but shall not include any on-site inspection of any project or program.

I. Complaints — Formal allegation against a party.

J. Detrimental Effect — Accomplishment of injury or damage to a cause or individual.

K. Emergency — A sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

L. Made Public — When the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.

M. Interference — Obstruction, to come in collision or be in opposition, clash.

N. Preponderance — A superiority in weight or power, importance or strength.



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